

March 29, 2010

Mr. John Phelps
Whitefish City Attorney
P.O. Box 158
Whitefish, MT 59937-0158

Dear Mr. Phelps:

You have requested my opinion on the following question:

Does a resort community retain its resort taxing authority even when a subsequent change in population means the municipality may no longer qualify for resort community status?

The City of Whitefish (Whitefish) became a resort community in 1995 when the electors approved a two percent resort tax under the authority of Mont. Code Ann. § 7-6-4462 (1995). Your letter informs me that at the time Whitefish approved the tax, it met all of the qualifications found in Mont. Code Ann. § 7-6-1501(5), including the requirement that the community have a population no greater than 5,500. The resort tax was approved for a period of twenty years, to 2016. In 2004, the electors voted to extend the resort tax an additional nine years, to 2025.

In 1995, the statutory qualifications for a resort community were as follows:

“Resort community” means a community that:

- (a) is an incorporated municipality;
- (b) has a population of less than 5,500 according to the most recent federal census or federal estimate;
- (c) derives the primary portion of its economic well-being related to current employment from businesses catering to the recreational and personal needs of persons traveling to or through the municipality for purposes not related to their income production; and

(d) has been designated by the department of commerce as a resort community.

Mont. Code Ann. § 7-6-4461(5) (1995). Although the statute was renumbered in 1997 as Mont. Code Ann. § 7-6-1501, its provisions remained the same until 2009, when the legislature deleted the phrase “or federal estimate” from subsection (5)(b).

Your letter informs me that although the City of Whitefish had a population less than 5,500 as of the 2000 federal census, federal estimates now place the population well above 5,500, and for purposes of your request I will assume that the 2010 federal census will do so as well. Your question is whether the validity of the action of the electors in extending the duration of the tax in 2004 depended on Whitefish having a population of less than 5,500 at the time of the election, and whether the electors can modify the tax in future elections. In other words, do the population increases subsequent to the creation of the resort tax somehow dissolve the resort taxing community, or otherwise prevent the electors from exercising their resort taxing authority? To answer that question, I rely on an Attorney General opinion from last year which concerned the resort area of Big Sky.

In 53 Op. Atty. Gen. No. 1 (2009), we were asked whether municipal incorporation of a portion of the property in an existing resort area would have any effect upon the boundaries and/or administration of the resort area district. Attorney General Bullock concluded that it would not, since there is no indication that, once established, a resort area loses its status or taxing authority even if the district no longer qualifies as a resort area under Mont. Code Ann. § 7-6-1501. 53 Op. Atty Gen. No. 1, ¶ 5. The opinion was based on the lack of definitive guidance by the Legislature, suggesting that “a resort taxing entity continues in existence until dissolved (if allowed by statute), and maintains its status irrespective of any subsequent changes within the district.” *Id.*, ¶ 7.

I find no reason to distinguish between resort areas or resort communities as those terms are defined in Mont. Code Ann. § 7-6-1501 (2009). Both have population thresholds that are relevant for purposes of initial qualification, but not for ongoing compliance. *Id.*, ¶ 8. Under this analysis, Whitefish is a qualified resort community irrespective of population changes within its boundaries, and it retains all of the taxing authority granted by law. See Mont. Code Ann. §§ 7-6-1502 through 7-6-1507.

My reasoning is unaffected by the 2009 amendments to Mont. Code Ann. § 7-6-1501. The title of the bill is “An Act Revising the Qualifications for Resort Areas and Resort Communities; Revising the Population Cap Based on the Most Recent Federal Census for an Area or a Community to Qualify as a Resort Area or Resort Community; and Amending Section 7-6-1501, MCA.” The title itself indicates that the Legislature

John Phelps
March 29, 2010
Page 3

intended to change the requirements for initial qualification, not to impose ongoing compliance requirements. Nor do the statutory changes evidence a legislative intent to restrict the taxing authority of an established resort area or community. To the contrary, they expand the ability of an incorporated municipality to qualify as a resort community, or an unincorporated area to qualify as a resort area, after October 1, 2009 on the basis of population. As long as the population as shown in the most recent federal census is under the statutory threshold of 5,500, the resort area or resort community is eligible for designation irrespective of population projections. Those new census figures will have no effect on Whitefish's resort community status because Whitefish became a qualified resort community in 1995, and by virtue of that status, retains its resort taxing authority irrespective of population changes thereafter.

Sincerely,

CIVIL SERVICES BUREAU

JENNIFER ANDERS
Assistant Attorney General

JA:ks